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11 UNITED STATES DISTRICT COURT
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
13 EASTERN DIVISION

14 INNOVATIVE NUTRACEUTICALS,
15 LLC,

16 Plaintiff,

17 v.

18 UNITED STATES OF AMERICA,

19 Defendant.

No. CV 5:18-cv-01400-JGB-SHK

**DEFENDANT'S NOTICE OF MOTION
AND MOTION TO DISMISS**

Hearing Date: February 11, 2019
Hearing Time: 9:00 a.m.

Honorable Judge Jesus G. Bernal
United States District Judge

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NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that, on February 11, 2019 at 9:00 a.m., as soon thereafter as they may be heard, Defendant United States of America will, and hereby does, move this Court for an order dismissing the complaint. This motion will be made in Courtroom 1 of the George E. Brown, Jr. Federal Building and Courthouse before the Honorable Jesus G. Bernal, United States District Judge, located at 3470 Twelfth Street, Riverside, CA 92501.

Defendant brings the motion on the ground that Plaintiff fails to state a claim on which relief can be granted (Fed. R. Civ. P. 12(b)(6)), Plaintiff's claims for prospective injunctive relief are not justiciable due to lack of standing and mootness (Fed. R. Civ. P. 12(b)(1)), and Plaintiff's claim for damages is barred by sovereign immunity and lack of jurisdiction (Fed. R. Civ. P. 12(b)(1)).

This motion is made upon this Notice, the attached Memorandum of Points and Authorities, and all pleadings, records, and other documents on file with the Court in this action, and upon such oral argument as may be presented at the hearing of this motion.

This motion is made following the conference of counsel pursuant to Local Rule 7-3 which was held on December 3, 2018.

Dated: December 17, 2018

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

3 Marijuana, with its derivatives, is a controlled substance under Federal law. As a
4 Schedule I controlled substance under the Controlled Substances Act, 21 U.S.C. § 801,
5 et seq. (“CSA”), marijuana may be summarily forfeited without notice. The definition of
6 marijuana under the CSA exempts certain portions of the plant (e.g., stalks and sterilized
7 seeds) which contain only trace amounts (parts per million) of naturally-occurring
8 cannabinoids, such as tetrahydrocannabinols (THC). Marijuana plant material that
9 contains greater than trace amounts of cannabinoids is derived from the non-exempt
10 portion of the marijuana plant and is marijuana within the definition of the CSA.

11 Plaintiff Innovative Nutraceuticals, LLC, is an importer of marijuana material
12 containing greater than trace amounts of THC. In this putative class action, Plaintiff
13 seeks the return of various shipments seized by Customs and Border Protection, damages
14 for destroyed shipments, and sweeping injunctive relief that would have this Court
15 rewrite the CSA and modify a complex scheme governing seizures and forfeitures. This
16 complaint fails to state claims for violations of the Administrative Procedure Act
17 (“APA”), as it demands relief in excess of that which the law provides, fails to state
18 claims under the Fifth Amendment due process clause, as there is no property interest in
19 contraband, and fails to identify a waiver of sovereign immunity to allow damages under
20 the APA. Finally, Plaintiff’s claims for prospective relief are not justiciable, as they lack
21 standing and face likely mootness.

II. STATEMENT OF FACTS¹

23 Plaintiff Innovative Nutraceuticals, LLC, is an importer of “crushed industrial
24 hemp material” from which they produce and market cannabidiol (CBD) products.
25 Complaint ¶¶ 1, 8. “Industrial hemp” is derived from the cannabis sativa plant. New
26 Hampshire Hemp Council, Inc. v. Marshall, 203 F.3d 1, 6 (1st Cir. 2000) (“the plant

¹ Plaintiff's allegations in the complaint are taken as true only for purposes of this motion to dismiss.

1 from which the industrial products are derived is cannabis sativa”); Hemp Indus. Ass’n
 2 v. Drug Enforcement Admin., 333 F.3d 1082, 1085 n.2 (9th Cir. 2003) (“[t]he industrial
 3 hemp plant itself . . . falls under the definition of marijuana”). Plaintiff’s shipments
 4 consist of marijuana-derived material cultivated from industrial hemp lawfully grown in
 5 Spain. Compl. ¶ 11. Test results from the shipper itself showed that the “hemp material”
 6 tested positive for up to 0.2% THC. Id. ¶ 19.

7 On November 30, 2015, Plaintiff imported 31 kilograms of hemp plant materials
 8 containing 0.3% or less of THC from L&M Natural Hemp in Spain. Id. ¶ 40, 41. The
 9 materials arrived at Los Angeles International Airport (“LAX”) on December 6, 2015,
 10 and were seized by the Department of Homeland Security (“DHS”). Id. ¶ 40.

11 On or about January 25, 2017, in Newark, New Jersey, DHS seized from Plaintiff
 12 another shipment from Spain of “industrial crushed hemp material.” Id. ¶ 45. The
 13 shipment had been destroyed by Defendants because it tested positive for marijuana. Id.
 14 ¶ 48.

15 On or about November 25, 2017, Customs and Border Protection (“CBP”)
 16 personnel seized shipment to LAX from Spain consisting of “crushed hemp plant
 17 material containing 0.3% or less of THC.” Id. ¶¶ 52-53.

18 On or about March 14, 2018, another shipment of Plaintiff’s “hemp plant
 19 materials containing 0.3% or less of THC” was seized at the Louisville, Kentucky
 20 airport. Id. ¶ 60-61. The shipment consisted of 50 kilograms of “crushed industrial hemp
 21 plant material” grown in Spain. Id. ¶ 60.

22 **III. REGULATORY FRAMEWORK**

23 **A. Marijuana under the CSA**

24 Marijuana is defined by Congress in the CSA as the entire Cannabis sativa plant,
 25 and its extracts and derivatives, with exemptions for mature stalks, extracts thereof, and
 26 certain seed extracts: 21 U.S.C. § 802(16).² The portions of the marijuana plant

27 ² Specifically, marijuana is defined in the CSA as
 28

1 exempted from the definition of marijuana under the CSA are those which are known to
2 contain little to no psychoactive THC. See Hemp Indus., 333 F.3d at 1085 (“Hemp seeds
3 and oil typically contain minuscule trace amounts of THC, less than 2 parts per million
4 [(0.0002%)] in the seed and 5 parts per million [(0.0005%)] in the oil”).

5 The CSA’s definition of marijuana does not include or exclude material based on
6 the quantity of THC present in that material, but instead includes or excludes material
7 based on the portion of the plant from which it is derived. See New Hampshire Hemp
8 Council, Inc., 203 F.3d at 6. However, the quantity of THC present in marijuana material
9 can be used to determine which part of the plant it is derived from. Scientific studies
10 have shown that “cannabinoids, such as tetrahydrocannabinols (THC), cannabinoids
11 (CBN) and cannabidiols (CBD), are found in the parts of the cannabis plant that fall
12 within the CSA definition of marijuana, such as the flowering tops, resin, and leaves.³”
13 DEA, Diversion Control Division, Clarification of the New Drug Code (7350) for
14 Marijuana Extract,

15 https://www.deadiversion.usdoj.gov/schedules/marijuana/m_extract_7350.html
16 (“Clarification”).

17 According to the scientific literature, cannabinoids are not found in the parts
18 of the cannabis plant that are excluded from the CSA definition of

19 all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds
20 thereof; the resin extracted from any part of such plant; and every
21 compound, manufacture, salt, derivative, mixture, or preparation of such
22 plant, its seeds or resin. Such term does not include the mature stalks of
23 such plant, fiber produced from such stalks, oil or cake made from the seeds
24 of such plant, any other compound, manufacture, salt, derivative, mixture,
25 or preparation of such mature stalks (except the resin extracted therefrom),
fiber, oil, or cake, or the sterilized seed of such plant which is incapable of
germination.

26 21 U.S.C. § 802(16).

27 ³ H. Mölleken and H. Hussman. Cannabinoid in seed extracts of Cannabis sativa
28 cultivars. J. Int. Hemp Assoc. 4(2): 73-79 (1997).

1 marijuana, except for trace amounts (typically, only parts per million)⁴ that
 2 may be found where small quantities of resin adhere to the surface of seeds
 3 and mature stalk.⁵ Thus, based on the scientific literature, it is not practical
 4 to produce extracts that contain more than trace amounts of cannabinoids
 5 using only the parts of the cannabis plant that are excluded from the CSA
 6 definition of marijuana, such as oil from the seeds. The industrial processes
 7 used to clean cannabis seeds and produce seed oil would likely further
 8 diminish any trace amounts of cannabinoids that end up in the finished
 9 product.

10 Clarification. See also Hemp Indus., 333 at 1085.

11 Thus, while material derived from the portions of the marijuana plant exempted
 12 from the CSA's definition of marijuana may contain trace amounts (parts per million) of
 13 THC, materials containing greater than trace amounts of THC are derived from those
 14 portions of the marijuana plant which are a Schedule I controlled substance under the
 15 CSA, and so are themselves Schedule I controlled substances. 21 U.S.C. § 802(16)
 16 (marijuana includes "every compound, manufacture, salt, derivative, mixture, or
 17 preparation of such plant, its seeds or resin"); see also United States v. Proyect, 989 F.2d
 18 84, 87-88 (2d Cir. 1993) (rejecting argument that low THC material is exempt from
 19 CSA, noting "extremely broad scope of the statutory definition" of marijuana).

20 **B. Legal status and seizures of Schedule I controlled substances.**

21 The CSA provides that all controlled substances in Schedule I and Schedule II (as
 22 defined in 21 U.S.C. § 802(6) and 812) that are possessed, transferred, sold or offered for
 23 sale in violation of the Act will be deemed contraband, seized and summarily forfeited to
 24 the United States. 21 U.S.C. § 881(f)(1) (emphasis added). The Controlled Substances
 25 Import and Export Act (21 U.S.C. § 951, et seq.) ("CSIEA") incorporates by reference

26
 27 ⁴ See id.; see also S. Ross et al., GC-MS Analysis of the Total Δ9-THC Content of
 Both Drug- and Fiber-Type Cannabis Seeds, J. Anal. Toxic., Vol. 24, 715-717 (2000).

28 ⁵ H. Mölleken, supra.

1 this contraband forfeiture provision of 21 U.S.C. § 881. See 21 U.S.C. § 965.
 2 Accordingly, in the case of a seizure of a Schedule I or Schedule II controlled substance,
 3 the CBP Fines, Penalties, and Forfeitures Officer or his designee will contact the
 4 appropriate DEA official responsible for issuing permits authorizing the importation of
 5 such substances (see 21 C.F.R. § 1312). If upon inquiry, the Fines, Penalties, and
 6 Forfeitures Officer or his designee is notified that no permit for lawful importation has
 7 been issued, he will declare the seized substances contraband and forfeited pursuant to
 8 21 U.S.C. § 881(f). Inasmuch as such substances are Schedule I and Schedule II
 9 controlled substances, the notice procedures set forth in 19 C.F.R. § 162.45 are
 10 inapplicable—meaning that a seizure notice is not required for Schedule I or Schedule II
 11 substances. See 19 C.F.R. § 162.45a.

12 **IV. ARGUMENT**

13 **A. Plaintiff fails to state a claim for violation of the Administrative
 14 Procedure Act.**

15 All of Plaintiff's causes of action fail to state claims under the Administrative
 16 Procedure Act, 5 U.S.C. §§ 701-706 (“APA”). Plaintiff does not specify how the APA
 17 was violated. Presumably, the alleged violation is related to the United States' seizure or
 18 destruction, in some cases without notice, of Plaintiff's marijuana shipments. Such
 19 actions, however, are permitted by law. The provision governing the scope of review
 20 under the APA provides that “[t]he reviewing court shall-- . . . (2) hold unlawful and set
 21 aside agency action, findings, and conclusions found to be-- (A) arbitrary, capricious, an
 22 abuse of discretion, or otherwise not in accordance with law . . .” 5 U.S.C. § 706
 23 (emphasis added). Because the alleged wrongs committed by the United States were
 24 committed in accordance with law, no APA action lies.

25 Although the CSA makes no reference to the quantity of THC present in its
 26 definition of marijuana (21 U.S.C. § 802(16)), Plaintiff seeks to rewrite the CSA to
 27 exempt all marijuana containing less than 0.3% THC. Compl. ¶ 24. As to the shipments
 28 seized, Plaintiff alleges that “test results from the shipper itself have indicated that the

1 hemp material tested positive for up to 0.2% THC.” Compl. ¶ 19. However, such
 2 quantities are hundreds of times the “parts per million” THC that are present in those
 3 portions of the marijuana plant exempted from the CSA, and are therefore derived from
 4 those portions of the marijuana plant which are not exempt from the CSA. Consequently,
 5 Plaintiff’s marijuana is a Schedule I controlled substance. 21 U.S.C. § 802(16).⁶

6 Schedule I controlled substances are “deemed contraband . . . and summarily
 7 forfeited to the United States.” 21 U.S.C. § 881(f). The summary forfeiture provisions of
 8 the CSA specifically allow forfeiture of Schedule I and II substances without notice. “If
 9 anything, it is clearly established that 21 U.S.C. § 881(f)(1) & (2) allows the summary
 10 forfeiture and destruction of [covered substances] without having to comply with the
 11 administrative procedures prescribed by the customs laws.” Conkey v. Reno, 885 F.
 12 Supp. 1389, 1396 (D. Nev. 1995). See also United States v. Gordon, 638 F.2d 886, 888
 13 (5th Cir. 1981) (importation of marijuana subject to summary forfeiture under 21 U.S.C.
 14 § 881(f)).

15 Plaintiff argues that “[t]he fact that these imported crushed hemp plant materials
 16 may test positive for trace amounts of THC does not make them illegal to import into, or
 17 to possess or sell in, the United States.” Compl. ¶ 16 (emphasis added). This argument is
 18 inapposite, as Plaintiff’s shipments, by their own admission, tested positive for far
 19 greater than trace amounts of THC. Compare Clarification (“trace amounts (typically,
 20 only parts per million)”) with, Compl. ¶¶ 19 (up to 0.2% THC), 22 (up to 0.3% THC).
 21 Furthermore, Plaintiff seeks wide-ranging injunctive relief, asking the Court to exempt
 22 from the CSA non-exempt portions of the marijuana plant that contain up to 0.3% THC.

23 Plaintiff also states, inaccurately, that, “[i]n 2014, Congress adopted the same

24

25 ⁶ The CSA is unambiguous as to the legal status of marijuana-derived material
 26 based on the portion of the plant from which it was derived. To the extent that Plaintiff
 27 believes that there is some ambiguity in the statute, the DEA is entitled to deference in
 28 its interpretation and application of the statute it administers. Chevron U.S.A. Inc. v.
Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984); Sharemaster v.
U.S. SEC, 847 F.3d 1059, 1066-68 (9th Cir. 2017).

1 THC threshold percentage in legalizing industrial hemp.” That Act did not, in fact,
 2 “legalize” industrial hemp. The Agricultural Act of 2014 allows “an institution of higher
 3 education . . . or a State department of agriculture” to grow marijuana containing not
 4 more than 0.3% THC only “for purposes of research conducted under an agricultural
 5 pilot program or other agricultural or academic research” and where such activities are
 6 permitted under the relevant state’s laws. 7 U.S.C. § 5940. Plaintiff does not allege that it
 7 is an institution of higher education or a State department of agriculture, it does not
 8 allege that it is growing, rather than importing, marijuana, and it does not allege that it is
 9 doing so for research purposes. Consequently, the Agricultural Act of 2014 has no
 10 bearing on Plaintiff.

11 Furthermore, the Agricultural Act of 2014 specifically provides that the permitted
 12 activities may be undertaken by covered entities “[n]otwithstanding the Controlled
 13 Substances Act,” indicating that, for all parties and activities not covered by the Act,
 14 marijuana containing up to 0.3% THC remains a Schedule I controlled substance under
 15 the CSA. Id.; Hemp Indus. Ass’n v. United States Drug Enforcement Admin., 720 F.
 16 App’x 886, 887 (9th Cir. 2018) (“[t]he Agricultural Act contemplates potential conflict
 17 between the Controlled Substances Act and preempts it [as to covered entities]”).⁷

18 Plaintiff’s first cause of action seeks injunctive relief that would abrogate the CSA
 19 and CSIEA by enjoining the United States from enforcing those laws as to marijuana
 20 derivatives which fall within the CSA’s definition of marijuana. Compl. ¶ 68.
 21 Consequently, Plaintiff’s first cause of action fails to state a claim under the APA.

22 Plaintiff’s second cause of action seeks to have the Court order the United States
 23 to provide notice and hearing at arbitrary intervals, in spite of a comprehensive
 24

25 ⁷ The recent “Agriculture Improvement Act of 2018” would amend the CSA to
 26 exempt marijuana containing up to 0.3% THC from the definition of marijuana. H.R. 2,
 27 115th Cong. §§ 10113, 12619 (2018). Like the Agricultural Act of 2014, this strongly
 28 indicates that, under current law, marijuana containing not more than 0.3% THC is not
 exempted from the CSA on that basis alone. Should the President sign this bill, it will
 moot Plaintiff’s claims for prospective relief, discussed infra.

1 legislative scheme that provides for notice and hearing in some forfeiture cases while
2 specifically exempting the forfeitures at issue from requiring any notice. Compl. ¶ 71.
3 Consequently, Plaintiff's second cause of action fails to state a claim under the APA.

4 Plaintiff's third cause of action, for an order requiring that the United States
5 preserve and return any seized shipments of marijuana containing up to 0.3% THC,
6 again requires that the United States ignore the CSA and CSIEA. Compl. ¶ 74.
7 Consequently, Plaintiff's third cause of action fails to state a claim under the APA.

8 Plaintiff's fourth cause of action seeks to have the United States reimburse
9 Plaintiff for seized marijuana despite the fact that the marijuana was summarily forfeited
10 according to statute. Compl. ¶ 77. Consequently, Plaintiff's fourth cause of action fails to
11 state a claim under the APA.

12 **B. Plaintiff fails to state a claim for due process violations.**

13 Plaintiff alleges in the second cause of action that the United States owes notice
14 and hearing for future seizures of marijuana at specified intervals as a matter of Fifth
15 Amendment due process. Compl. ¶ 71. Plaintiff alleges in the third cause of action that
16 the failure to return its marijuana constituted a deprivation of due process under the Fifth
17 Amendment. Compl. ¶ 74. Plaintiff's alleges in the fourth cause of action that the United
18 must reimburse it for seized marijuana as a matter of Fifth Amended due process.
19 Compl. ¶ 77. However, because Plaintiff cannot establish a legally protected interest in
20 the marijuana at issue, it cannot state a due process claim.

21 To establish a due process claim, the plaintiff must show the Government
22 deprived it of a "liberty or property interest" to which it had a "legitimate claim of
23 entitlement," and that "the procedures attendant upon that deprivation were
24 constitutionally [in]sufficient"). Ky. Dep't of Corrections v. Thompson, 490 U.S. 454,
25 460 (1989). The Supreme Court has held that no person can have a legally protected
26 interest in contraband per se. See United States v. Jeffers, 342 U.S. 48, 53 (1951); see
27 also Cooper v. City of Greenwood, Mississippi, 904 F.2d 302, 305 (5th Cir. 1990). "An
28 object is contraband per se if its possession, without more, constitutes a crime; or in

1 other words, there is no legal purpose to which the object could be put.” United States v.
 2 Harrell, 530 F.3d 1051, 1057 (9th Cir. 2008). As discussed supra, the possession and
 3 importation of marijuana is a crime under federal law. See, e.g., 21 U.S.C. §§ 812(c),
 4 841(a)(1), 844(a). Thus, under federal law, marijuana is contraband per se, which means
 5 no person can have a cognizable legal interest in it. See Gonzales v. Raich, 545 U.S. 1,
 6 27 (2005) (“The CSA designates marijuana as contraband for any purpose.”).
 7 Consequently, courts regularly dispose of due process claims for marijuana for failure to
 8 state a legally protected interest. See, e.g., Little v. Gore, 148 F. Supp. 3d 936, 956 (S.D.
 9 Cal. 2015); Torres v. Cty. of Calaveras, No. 1:17-CV-1568 AWI-SKO, 2018 WL
 10 1763245, at *2 (E.D. Cal. Apr. 12, 2018).

11 **C. Plaintiff fails to identify a waiver of sovereign immunity for damages.**

12 Plaintiff’s fourth cause of action, for damages, is barred by sovereign immunity,
 13 as the APA does not provide a waiver of sovereign immunity for damages. See 5 U.S.C.
 14 § 702 (granting the consent of the United States to suit in actions “seeking relief other
 15 than money damages”); see also Marshall Leasing, Inc. v. United States, 893 F.2d 1096,
 16 1100 (9th Cir. 1990) (while APA waives sovereign immunity with respect to equitable
 17 claims, there is no waiver of sovereign immunity that would allow a plaintiff to recover
 18 monetary damages from the government in the alternative); Matsuo v. United States, 416
 19 F. Supp. 2d 982, 994 (D. Haw. 2006) (“A request for compensatory damages for
 20 constitutional violations does not come within the APA’s waiver under § 702”).

21 **D. Plaintiff fails to establish jurisdiction under the Little Tucker Act.**

22 Plaintiff’s fourth cause of action, for damages, also cites the Little Tucker Act, 28
 23 U.S.C. § 1346(a)(2). Compl. ¶ 77. The Little Tucker Act provides that district courts
 24 have concurrent jurisdiction to hear certain non-tort claims not exceeding \$10,000
 25 against the United States. Claims exceeding this amount fall within the exclusive
 26 jurisdiction of the United States Court of Federal Claims. 28 U.S.C. §§ 1346(a)(2),
 27 1491(a)(1); see also Hewitt v. Grabicki, 794 F.2d 1373, 1382 (9th Cir. 1986). The Little
 28 Tucker Act does not create substantive rights but is simply a jurisdictional provision.

1 United States v. Bormes, 568 U.S. 6, 10 (2012). It is not clear what substantive rights
2 Plaintiff seeks to enforce in invoking the Little Tucker Act.

3 As Plaintiff seeks to invoke the jurisdiction of this Court, it bears the burden of
4 establishing that such jurisdiction exists. See V S Limited P'ship v. Dep't of Housing
5 and Urban Dev., 235 F.3d 1109, 1112 (8th Cir. 2000) (“The burden of proving subject
6 matter jurisdiction falls on the plaintiff. . . . To sue the United States, [plaintiff] must
7 show both a waiver of sovereign immunity and a grant of subject matter jurisdiction. . . .

8 The Tucker Act . . . vests exclusive subject matter jurisdiction over all such suits in
9 excess of \$10,000 in the Court of Federal Claims.”)

10 Because Plaintiff’s complaint fails to allege the quantum of monetary relief it
11 seeks, it has failed to establish that this Court has subject matter jurisdiction to hear the
12 claim. Consequently, its claim must be dismissed.

13 **E. Plaintiff’s claims for prospective injunctive relief are not justiciable.**

14 Plaintiff seeks wide-ranging prospective injunctive relief that would forbid the
15 government from seizing marijuana imported from foreign countries containing not more
16 than 0.3% THC and would require that the government implement the Plaintiff’s
17 specified procedures if such marijuana is seized. Compl. ¶¶ 68, 71. These prospective
18 claims are subject to dismissal for lack of standing. “The judicial Power of the United
19 States” extends only to “Cases” and “Controversies.” U.S. Const. art. III, § 2. The
20 Supreme Court has established that the “irreducible constitutional minimum” of standing
21 consists of three elements. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).
22 The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the
23 challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable
24 judicial decision. Id., at 560–561. The plaintiff, as the party invoking federal jurisdiction,
25 bears the burden of establishing these elements. FW/PBS, Inc. v. Dallas, 493 U.S. 215,
26 231 (1990). Where, as here, a case is at the pleading stage, the plaintiff must “clearly . . .
27 allege facts demonstrating” each element. Warth v. Seldin, 422 U.S. 490, 518 (1975).

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1. Plaintiff lacks standing where it could avoid harm by complying with law.

Standing is inappropriate where the future injury could be inflicted only in the event of future illegal conduct by the plaintiff. “[W]e are . . . unable to conclude that the case-or-controversy requirement is satisfied by general assertions or inferences that in the course of their activities respondents will be prosecuted for violating valid criminal laws. We assume that respondents will conduct their activities within the law and so avoid prosecution and conviction.” O’Shea v. Littleton, 414 U.S. 488, 497 (1974); see also Hodgers–Durgin v. De La Vina, 199 F.3d 1037, 1041 (9th Cir.1999) (en banc) (no standing where injury “contingent upon respondents’ violating the law, getting caught, and being convicted.”) (quoting Spencer v. Kemna, 523 U.S. 1, 15 (1998)).

Here, Plaintiff seek to restrain the United States from seizing future shipments of Schedule I marijuana and to require the United States to provide process that is, by law, not accorded to seizures of contraband. Plaintiff lacks standing to bring such claims for prospective injunctive relief, as, so long as Plaintiff does not violate provisions regarding the importation of controlled substances, they will suffer no future harms requiring redress.

2. Plaintiff's claims will likely be rendered moot by changes in law.

“[I]t is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment” is under review. Burke v. Barnes, 479 U.S. 361, 363 (1987). Article III of the United States Constitution “requires that there be a live case or controversy at the time that” a reviewing federal court decides the case. Id. “Applying that limitation, the Supreme Court and our court have repeatedly held that a case is moot when the challenged statute is repealed, expires, or is amended to remove the challenged language.” Log Cabin Republicans v. United States, 658 F.3d 1162, 1166 (9th Cir. 2011). Where a statute is changed or repealed such that “there is no longer any risk that [plaintiff] will be subject to the challenged ordinance, there exists no live issue upon which the court could issue prospective relief” and the case is moot. Outdoor

1 Media Grp., Inc. v. City of Beaumont, 506 F.3d 895, 901 (9th Cir. 2007).

2 Plaintiff's claims for prospective relief will likely become moot in the near future.
3 The "Agriculture Improvement Act of 2018,"⁸ passed by the Senate on December 11,
4 2018, and the House of Representatives on December 12, 2018, would amend the CSA
5 to exempt marijuana containing up to 0.3% THC from the definition of marijuana. H.R.
6 2, 115th Cong. §§ 10113, 12619 (2018). With this change, Congress is providing
7 Plaintiff with the relief sought in its first cause of action, which seeks to prohibit the
8 seizure of marijuana containing not more than 0.3% THC. It will also resolve Plaintiff's
9 second cause of action, seeking to impose notice and hearing procedures where
10 marijuana of not more than 0.3% THC is seized, as such material will not be seized if it
11 is exempt from the CSA. The enactment of this bill will moot Plaintiff's claims for
12 prospective injunctive relief.⁹

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27 ⁸ This act is colloquially known as the "Farm Bill."

28 ⁹ Government counsel promptly notified Plaintiff's counsel of the passage of the
law and its effects on this dispute.

1 **V. CONCLUSION**

2 The legal landscape governing marijuana is complex and rapidly changing.
3 However, as of this writing, the relevant portions of the marijuana plant remain a
4 Schedule I controlled substance under the CSA, and the importation of such substances
5 is illegal and subject to summary forfeiture. “The policy arguments raised by the
6 plaintiffs are best suited for Congress rather than a federal courtroom[.]” Monson v.
7 Drug Enforcement Admin., 522 F. Supp. 2d 1188, 1202 (D.N.D. 2007) (finding that
8 “hemp” containing under 0.3% THC was marijuana for purposes of CSA), aff’d, 589
9 F.3d 952 (8th Cir. 2009). Congress may soon change the status of marijuana under
10 federal law, and if its material is seized without notice at such time, Plaintiff may have a
11 valid claim. However, under current federal law, Plaintiff has no claims and the
12 complaint should be dismissed.

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14 Dated: December 17, 2018

Respectfully submitted,

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